

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

Matrex Exhibits, Inc.

Employer

and

Case 13-RC-21385

Chicago Regional Council of Carpenters, Local 1027

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.¹

I. Issues

The Petitioner seeks to represent a unit comprised of “all full-time, regular part-time, and temporary carpenters and warehouse assistants employed by the Employer at its facility, excluding sales employees, design employees, estimating employees, office clerical employees and guards, professional employees and supervisors as defined by the Act.”² The Petitioner seeks to exclude the senior carpenter, also referred to in the record as the carpenter foreman, David Schwilk, contending that he is a supervisor within the meaning of the Act.

The Employer stipulated that any unit found appropriate should include “all full-time, regular part-time and temporary carpenters and warehouse assistants employed by the Employer at its facility...” and exclude the same classifications noted by the Petitioner above. The Employer maintained however, that the only appropriate unit would also include “all employees who participate in the production of the trade show exhibits that are produced by Matrex.” This

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

² As amended at hearing.

unit would include the classifications of graphics employees, project managers and field service supervisors. The Employer further maintained that the carpenter foreman David Schwilk was not a supervisor within the meaning of the Act and therefore should be included in the Unit. Additionally, the Employer took the position that individuals hired on a temporary or short term basis as “freelance carpenters” constituted independent contractors and should be excluded from any unit found appropriate. The Employer specifically contended that an individual named Dennis Martin had been hired by the Employer as an independent contractor and was therefore ineligible to vote.

The Petitioner maintained that individuals hired by the Employer as freelance carpenters were not independent contractors and should therefore be included in the unit.

II. Decision

For the reasons discussed below, I find that the unit sought by the Petitioner as amended at hearing is appropriate. I further find that the carpenter foreman David Schwilk is not a supervisor within the meaning of the Act and is therefore properly included in the unit. Finally, I find that individuals hired by the Employer as freelance carpenters are not independent contractors, but rather constitute temporary carpenter employees and are therefore included in the unit.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full-time, regular part-time, and temporary carpenters and warehouse assistants employed by the Employer at its facility currently located at 310 South Church Street, Addison, Illinois. Excluding sales employees, design employees, estimating employees, graphics employees, project managers, field service supervisor employees, office clericals, professional employees, guards and supervisors as defined by the Act.

III. Facts and Analysis

A. Unit Composition:

The Act does not require that the bargaining unit sought by the Petitioner be the *only* appropriate unit, or the *ultimate* unit, or even the *most* appropriate unit; the Act only requires that the petitioned-for unit be an appropriate one, such that employees are insured “the fullest freedom in exercising the rights guaranteed by this Act.” *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037 (1967); *Morand Beverage Co.*, 91 NLRB 409 (1950) enf’d. 190 F.2d 576 (7th Cir. 1951). The burden is on the party challenging the unit to show that the petitioned-for bargaining unit is inappropriate; if the unit sought by the petitioning labor organization is appropriate, the inquiry ends. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988). A unit is appropriate where employees in the unit have a separate community of interest from other job classifications. In determining this community of interest, the Board examines such factors as wages, hours and working conditions, commonality of supervision, degree of skill and common functions, frequency of contact and

interchange with other employees, and functional integration. *Boeing Co.*, 337 NLRB 152, 153 (2001).

i. Carpenters:

The Employer is in the business of designing and building custom trade show exhibits. The Employer's carpenters are responsible for building many of the component parts used in these exhibits. In so doing, carpenters are required to cut material, laminate material, build crates, cabinets and other components which ultimately will be assembled as part of the final exhibit. In performing these duties carpenters use a variety of equipment provided by the Employer, including power tools such as table saws, and screw guns. Additionally carpenters use various hand tools including screwdrivers, power hand tools and drills which are provided by the Employer. Carpenters may, if they choose, supply their own hand tools. Carpenters do not use computers in the performance of their duties for the Employer. Carpenters perform these duties primarily at their work benches in the shop area located in the lower right quadrant of the Employer's facility.

Additionally, carpenters assist warehouse employees in the performance of their duties, which include retrieving inventory, and packing and unpacking crates. This work is performed throughout the warehouse area which comprises the majority of the Employer's facility and borders the carpenter's shop area to the left of that area, and is separated by a wall from the office area containing the project manager, graphic employees and field service supervisor offices which are located in the quadrant above the shop area. Thomas Chalumecky, the Employer's Director of Operations estimated that carpenters spend approximately 80% of their time building component parts and/or assisting warehouse employees with inventory and crates. The remaining 20% is spent assembling and disassembling trade show exhibits. Assembly of these exhibits takes place primarily in the "set up area" which is a 70 foot by 70 foot staging area located close to the center of the Employer's facility.

Carpenters are not required to have any formal education or training. Carpenters receive work assignments from the carpenter foreman David Schwilk. Carpenters are supervised by the Director of Operations Thomas Chalumecky, who among other duties is responsible for hiring, firing, disciplining, evaluating, and scheduling these employees. Carpenters work a designated schedule beginning at 6:30 a.m. and ending at 3:00 p.m. Carpenters receive a designated lunch break from 12:00 p.m. to 12:30 p.m. and two designated breaks at 9:00 a.m. and 2:00 p.m. Carpenters must punch in and out at the beginning at end of their shift and for the lunch break at the time clock. The time clock is located near an entrance to the facility near the men's washroom to the right of the shop area.

Carpenters are hourly paid and earn between \$21.00 to \$24.00 dollars per hour based in large part upon length of experience. The shop foreman is paid \$25.50 per hour. Carpenters receive fringe benefits identical to those of all other employees which include vacation, health insurance, vision and dental benefits, end of the year bonus and are eligible to participate in the Employer's 401K and profit sharing programs.

Carpenters are eligible for overtime. Director of Operations Chalumecky has sole authority to determine the need for overtime. In the event Chalumecky determines the need for overtime, assignment of overtime is evenly distributed among carpenters willing and able to work the extra hours.

Carpenters perform all their work at the Employer's Addison facility and do not travel as part of their regular duties. Nor do carpenters have contact with the Employer's customers as a regular part of their duties. Carpenters have never been temporarily assigned to perform duties as graphic employees, project managers or field service supervisors. As of the date of the hearing there were nine carpenters including the shop foreman David Schwilk.

ii. Warehouse Assistants

As noted above, warehouse assistants work primarily in the warehouse portion of the Employer's facility. This area is comprised of the shipping docks located at the opposite side of the facility from the carpenter's shop and office area. Warehouse assistants typically park their cars and enter the facility from the entrance located at the dock area. The record indicates that employees in all other classifications park in the parking lot located at the opposite side of the Employer's facility and enter the facility at one of two doors on that side. Warehouse assistants are supervised by Chris LoBosco, the Warehouse Manager.³ The Employer's CEO/President Jill Herbert testified that LoBosco has on occasion "managed" carpenter employees and field service supervisors, when the Director of Operations is unavailable. Herbert testified that LoBosco acts in this capacity because he has the most seniority. Warehouse assistants also receive work assignments from the carpenter foreman David Schwilk when they assist carpenter employees as will be more fully discussed below.

Warehouse assistants are responsible for maintaining the Employer's inventory, loading and unloading crates, and packing and shipping exhibits. When exhibits are shipped back to the Employer's facility, warehouse assistants open and inspect the shipment, then inventory and store the items. In performing these duties, warehouse assistants use a computer for inventory purposes and forklifts for moving inventory throughout the Employer's facility. Warehouse assistants also assist carpenter employees by regularly building shipping crates and "pulling," cutting, and staging lumber. Warehouse assistant employee Mark Walsh testified that he considered himself a "carpenter's helper" by virtue of the performance of these duties. When performing these duties warehouse assistants use a variety of hand tools including screw guns and drills. Chalumecky estimated that warehouse assistants spend approximately 80% of their time performing these duties. The remaining 20% is spent assembling and disassembling display exhibits in the set up area described above.

Warehouse assistants are not required to have any specialized training or education. Many however have some carpentry experience. Warehouse assistants are hourly paid and are required to punch in and out at the beginning and end of their shifts as well as at their lunch break. Warehouse employees, like carpenter employees are eligible for overtime. Warehouse

³ The parties stipulated that LoBosco has authority to hire and fire employees and is a supervisor within the meaning of the Act.

employees are paid between \$19.00 to \$21.00 per hour. Warehouse employees work the same designated hours as carpenter employees, and receive lunch and two breaks at the same designated time that carpenter employees do. Warehouse employees receive identical benefits as all other employees including vacation, health insurance, year end bonuses, vision and dental benefits and are eligible to participate in the Employer's 401K and profit sharing programs.

Warehouse assistant employees have never substituted for graphic employees, project managers or field service employees. Warehouse assistant employees have little or no customer contact and do not travel as a part of their duties for the Employer. At the time of the hearing there were two warehouse assistants employed by the Employer.

iii. Graphic Employees:

Graphic employees are responsible for developing the graphic component of the display exhibits created by Matrex. In performing this function graphic employees work in their own individual cubicles located in the graphics area of the Employer's office space. In creating these graphics, graphic employees receive the image to be created from an outside design agency via computer disc or an e-mailed digital file. After receiving the digital file graphic employees utilize a specialized computer software program identified in the record as "Illustrator" to develop the design to printable form. None of the Employer's other job classifications use this computer program in the performance of their regular work duties. After creating the design, graphic employees either print the final graphics using a printer located in the graphics department, or, if the job is too large or complicated, may send the graphic design to an outside source for printing.

Once the graphic image developed by graphic employees is printed out, graphic employees cut the design and apply the design to various media including "Cintra," which was described in the record as a type of thin plastic PVC material. Graphic employees then apply this to thin wood panels that ultimately are assembled into the overall display. Application of the graphic design to the display material typically is performed in the shop area. Alternatively, graphics developed by these graphic employees would be applied to fabric panels. These panels would in turn be fitted over light aluminum extrusion frames in the exhibit itself.

Director of Operations Thomas Chalumecky estimated that graphic employees spend approximately 80% of their time developing and printing the graphic. These duties are performed exclusively in the graphics department which is located in the upper right quadrant of the Employer's facility in the office area. The graphics department is set off from the warehouse area by a wall and separated from the carpenter's shop by the offices of the project managers. Chalumecky estimated that graphic employees spend the remaining 20% of their time fitting the graphics onto the display exhibit. This work takes place in the set up area located in the middle of the Employer's facility as described above. Some of this work is performed along side carpenters and warehouse employees who are also assembling the exhibit. Graphic employee Steve Janoskey testified that a portion of this assembly regularly occurs after the carpenters and warehouse employees leave for the day. Janoskey testified that such after hours work arises because jobs may come in after the shop leaves for the day which need to be completed in a very short timetable.

Graphic employees are required to have previous trade show experience, however are not required to have carpentry experience. Graphic employees are salaried and are paid between \$45,000 and \$60,000 annually. Graphic employees are not required to punch a time clock. CEO Herbert testified that typically graphic employees report and leave later than carpenters and warehouse employees. Graphic employees are not required to take lunch or other breaks at any designated time, but rather, may take such breaks at their discretion. Graphic employees are not eligible for overtime. As noted above graphic employee Steve Janosky testified that he frequently stays late after the carpenters and warehouse employees leave to complete “emergency” work which needs to get done immediately.

Graphic employees typically use a different entrance than either warehouse or carpenter employees which is located on the right side of the Employer’s facility above the entrance typically used by the carpenters. Graphic employees are supervised by Graphics Manager Jeff Heller.⁴ Heller has no supervisory authority over carpenters or warehouse employees.

Graphic employees receive benefits identical to all of the Employer’s other employees as described above. At the time of hearing there were two graphics employees employed by the Employer.

iv. Project Managers:

CEO Herbert described project managers as draftsmen and purchasing agents for Matrex and characterized project managers as “engineers.” Project managers report directly to the Director of Operations. Production manager Jason Repa testified that he becomes involved in the process after a booth design is sold to a client. At that point he attends a production meeting with representatives from the Employer’s sales staff, design, and estimating departments, carpenter foreman David Schwilk and the Director of Operations during which the customer’s requirements are discussed. After such meeting, the design department submits a rendering of the exhibit to the project managers. Project managers are then responsible for drafting construction and assembly drawings which are subsequently utilized by carpenter employees to fabricate component parts and construct the overall display.

In drafting these plans project managers utilize a computer software program identified in the record as AutoCad. No other job classification employed by the Employer uses this software program in the regular performance of their duties. Project managers draft these construction and assembly drawings on computers in their cubicles which are located inside the office area of the Employer’s facility. Additionally project managers are responsible for ordering materials used in the construction of exhibits and creating inventory lists which are then distributed to the Director of Operations, warehouse employees and field service supervisors.

Repa testified that project managers “oversee” assembly of the exhibit by making themselves available to address questions and make modifications to the design drawings based

⁴ The parties stipulated that Heller has the authority to hire and fire and is a supervisor within the meaning of the Act.

on suggestions and input from the carpenters performing the actual fabrication work. Repa estimated that approximately 70% of his duties entail drafting of the construction and assembly drawings. Repa estimated that he spends 25 to 30% of his time doing hands on project assembly. This work is performed in the set-up area described above. Repa further testified that in working on the project assembly he only does simple assembly such as changing out faucets or making small repairs. In performing these duties, Repa uses small hand tools. Repa testified that only carpenter employees perform the complex work on the assembly projects. Repa further testified that he does not assist carpenter employees with their fabrication of component parts such as building cabinets for the exhibits. Repa testified that during the busy season, he has built shipping crates for the exhibit, however has only performed this type of work by himself after the carpenters and warehouse employees have gone home for the day.

Project managers are apparently required to have some college experience. In this regard, Repa testified that he had two years of college when he was hired by CEO Herbert. Project managers may also be required to travel as a part of their duties. In this regard Repa traveled outside the office approximately three times during the past five years on business for the Employer.

Project managers are salaried and are paid between \$60,000 to \$80,000 per year. Project managers do not punch the time clock and have no designated starting and ending times or breaks. Repa testified that his hours may vary anywhere from 4:00 a.m. to midnight. Project managers do not receive overtime pay, but are entitled to bonuses. Project Managers typically use the same entrance that is utilized by carpenter employees and receive benefits identical to all of the Employer's other employees discussed above. At the time of the hearing the Employer employed four project managers.

v. Field Service Supervisors:

Field Service Supervisors are responsible for supervising the installation and dismantling of the display exhibits created by Matrex employees at various trade show locations.⁵ As such, field service supervisors travel extensively, have extensive client contact and spend approximately 90% of their time in the field and away from the Employer's Addison facility.

⁵ In its brief, the Employer maintained that the parties agreed at hearing that the employee classification "field service supervisor" was not a supervisor within the meaning of the Act. (Employer's Brief pg. 3). However, at hearing, the parties stipulated only that one specific field service supervisor, Mike Olmstead was not a supervisor within the meaning of the Act because he did not have the authority to hire, transfer, suspend, lay off, recall, promote, reward, discharge, assign, discipline, direct, or adjust grievances, or effectively recommend such action. (Transcript pg. 157). For the reasons set forth above in this decision, I find that the classification of field service supervisor does not share a sufficient community of interest with the Employer's carpenters and warehouse assistants to mandate inclusion of field service supervisors with a unit comprised of the Employer's carpenters and warehouse assistants. Therefore I make no finding as to the supervisory status of field service supervisors other than Mr. Olmstead who the parties stipulated and I find based upon that stipulation is not a supervisor within the meaning of the Act.

Field service supervisors only spend approximately 10% of their time at the Employer's Addison facility. Field service supervisors have a separate office area at the Addison facility where these individuals have their own cubicle housing their own computer. These offices are located in the general office area at the Employer's facility which is set apart from the carpenter's shop and warehouse operations as described above.

When physically present at the Employer's Addison facility, field service supervisors spend a portion of their time assisting in the assembly of exhibits for display to customers and building an occasional shipping crate. Field service supervisors have no involvement in the fabrication of component parts for the exhibits.

All field service supervisors are salaried and are not required to punch a time clock. In this regard, field service supervisor Mike Olmstead testified that he had a flexible start time and usually began work about 7:00 a.m. Olmstead further testified that he did not need to seek permission to work more than 8 hours per day or 40 hours per week. Field Service Supervisors do not have designated start/stop times or designated breaks. Field Service Supervisors earn between \$60,000 to \$70,000 per year and are not eligible for overtime. Field Service Supervisors receive identical benefits as the rest of the Employer's employees described above. When in the field, field service supervisors report directly to Director of Services M.J. Pearson⁶. During the approximately 10% of the time that these employees are present at the Addison facility, they also report to Director of Operations Chalumecky. At the time of the hearing the Employer employed six field supervisors.

vi. Analysis:

Upon the record evidence in this case, I find that the petitioned-for unit consisting of the Employer's carpenters and warehouse employees has a separate community of interest from the Employer's other job classifications and constitutes an appropriate unit for the purposes of collective bargaining. Thus record evidence shows that the Employer's carpenters and warehouse employees share fundamental conditions of employment. Specifically, carpenters and warehouse assistants are the only employee classifications that are hourly paid; required to use a time clock; have designated start, stop, and break times that are identical; and are eligible to receive overtime pay. All other employee classifications at issue are salaried; have flexible start, stop, and break times; are not required to use a time clock; and are not eligible for overtime pay. Further, neither carpenters nor warehouse employees are required to travel as part of their job duties, unlike the Employer's project managers and field service supervisors.

Record evidence demonstrates that carpenter employees spend approximately 80% of their time building component parts for the Employer's displays and/or assisting warehouse employees in the performance of their duties. Warehouse employees spend approximately 80% of their time maintaining the Employer's inventory, loading and unloading crates; packing and shipping exhibits; and assisting carpenter employees by

⁶ The parties stipulated that Pearson has the authority to hire and fire and is a supervisor within the meaning of the Act.

regularly building shipping crates; and pulling, cutting, and staging lumber. Carpenters and warehouse employees perform these duties in the carpenter shop and warehouse areas of the facility. None of these duties are performed in the Employer's walled off office area or outside of the Employer's Addison facility. These duties are distinct from the duties primarily performed by the Employer's project managers, graphic, and field service supervisor employees, and are performed in different locations than where project managers, graphic, and field service supervisors perform the bulk of their duties.⁷

Thus, record evidence shows that the Employer's project managers spend the majority of their time, some 70 – 75% drafting construction and assembly designs. Project managers perform these duties in their office cubicles which are located in the walled off office area of the Employer's facility. Graphic employees spend approximately 80% of their time developing and printing the graphic designs which are ultimately applied to the final exhibit. Graphic employees perform these duties in their office cubicles located in the walled off office area of the Employer's facility. Field Service Supervisor employees spend approximately 90% of their time in the field away from the Employer's Addison facility. Their primary function in the field is to oversee the assembly of the Employer's exhibits on site at trade shows by other outside tradesmen. While record evidence demonstrated that carpenter employees and warehouse employees regularly assist each other with their core duties, neither carpenter nor warehouse employees have ever substituted for or assisted project managers, graphic employees or field service supervisors with the duties each of those classifications spend a majority of their time performing.

Additionally carpenter and warehouse employees at times share common supervision or direction. Thus the parties stipulated that warehouse employees are directly supervised by Chris LoBosco. Record testimony showed that LoBosco also "manages" carpenter employees when their immediate supervisor, Thomas Chalumecky is unavailable. Similarly, carpenter employees receive their assignments from carpenter foreman David Schwilk. Schwilk is responsible for distributing work assignments to warehouse employees when they assist carpenter employees.

In addition to the core duties separately performed by each job classification described above, all employee classifications spend a portion of their time working together in assembling and disassembling display exhibits for review by the Employer's clients at the Employer's facility. Significantly, this work occurs only after the carpenters have constructed the exhibit components. The fact that all employees spend a portion of their time working together on such a common project does not negate the overwhelming community of interest carpenters and warehouse employees share, nor does it mandate the inclusion of the remaining classifications in that unit in view of the significant differences in fundamental duties and working conditions described above.

⁷ As noted above, both graphic employees and project managers perform the majority of their core duties in offices separated from the shop and office area. Field service supervisors perform the majority of their core duties in the field away from the Employer's Addison facility.

In seeking to include graphic employees, project managers and field service supervisors in the unit, the Employer argues that the Board has found plant-wide units presumptively appropriate and that the Petitioner failed to present evidence to rebut that presumption, citing *Airco, Inc.* 273 NLRB 348 (1984). In *Airco*, unlike the instant case, the Petitioner itself sought a plant-wide unit. Beginning with the fundamental proposition that it is the burden of the party challenging the petitioned-for unit to show that such unit is inappropriate, the Board in *Airco* found that the Employer therein failed to meet that fundamental proposition when it sought to carve out and exclude one classification of employees who the Union sought to include. Similarly in *American Publishing Company of Michigan*, 308 NLRB 563 (1992) which was also cited by the Employer in support of its argument regarding the presumptive appropriateness of a plant-wide unit, the union therein sought to represent a plant-wide unit and the Employer failed to rebut the presumption that the petitioned-for unit was appropriate.⁸ Thus, these cases are inapplicable to the instant matter, inasmuch as the Petitioner herein does not seek to represent a broader unit comprised of all the Employer's production employees, and has demonstrated that a unit comprised only of carpenters and warehouse assistants share a distinct community of interest sufficient to constitute an appropriate unit in and of itself.

Based upon the foregoing, I find that a unit comprised of the Employer's full-time, regular part-time and temporary carpenters and warehouse assistants an appropriate unit under Section 9(b) of the Act and direct an election in that unit.

B. Supervisory Status of David Schwilk:

The Act expressly defines the term "supervisor" in Section 2(11), which provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not

⁸ In support of its argument for a unit broader than that petitioned for by the Union herein, the Employer also cited *Harrah's Illinois Corporation* 319 NLRB 749 (1995). In that case, the Board found that the unit sought by the Petitioner therein limited only to certain maintenance employees was inappropriate due in significant part to the large number of transfers among all job classifications that the Employer sought to have included in the unit. Due to this "fluidity of movement" among the various classifications, the Board found that the narrow unit petitioned for by the Union was inappropriate and dismissed the petition. As noted above, there is no evidence that either warehouse employees or carpenters have transferred to become, or perform the core tasks of, graphic employees, project managers, or field service supervisor employees. As such, there is no "fluidity of movement" as was the case in *Harrah's*. *Harrah's* is therefore inapposite to the instant case.

of a merely routine or clerical nature, but requires the use of independent judgment.
29 U.S.C. § 152(11).

The Supreme Court has interpreted the text of the above-quoted statute to set forth a three-part test for determining supervisory status. *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001), citing, *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994). Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve supervisory functions noted above, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” *Id.* While the Board has reasonable discretion in interpreting whether the degree of judgment exercised in one of the twelve categories falls within the “routine” or “clerical” category, once the Board has determined that the judgment exercised is independent in nature, the individual in question is deemed to be a supervisor under Section 2(11) of the Act. *Kentucky River*, 532 U.S. at 717. Finally, the burden of proving supervisor status rests solely upon the party claiming it. *Id.* at 711.

David Schwilk began working for the Employer as a carpenter approximately six years ago. Although the record did not specify when, after working for the Employer for some period of time, Schwilk was promoted to the position of carpenter foreman.⁹ As carpenter foreman, Schwilk is hourly paid and receives \$25.50 per hour. Schwilk is required to punch in and has the same designated breaks at the same designated times as the other carpenters. Schwilk does not sign off on employee time cards or time sheets. Schwilk receives the same benefits as all the other job classifications of employees discussed above, including the other carpenters. Schwilk does not receive any additional or different benefits than those received by the rest of the carpenters. Schwilk, like the other carpenter employees, is eligible to receive overtime.

Schwilk reports directly to the Director of Operations Thomas Chalumecky. Schwilk meets with Chalumecky on a daily basis. According to both Schwilk and Chalumecky, Schwilk serves as the “liaison” between the office and shop. During these daily meetings, Chalumecky discusses the various projects which need to be built by the carpenters. According to Chalumecky, during these meetings he “pretty much dictate(s) to Dave who can do what.” After these meetings, Schwilk takes the schedule developed by Chalumecky to the shop and posts it. According to Schwilk, he then makes assignments to the carpenters based on “what Tom told me.” As the liaison between the shop and office, Schwilk also attends regular production meetings with Chalumecky and the project manager which occur prior to the beginning of all new projects. During these meetings the project manager reviews the construction drawings with Schwilk. Schwilk then distributes the construction drawings to the carpenters in accordance with his discussions with Chalumecky.

During the course of the day, Schwilk inspects the quality and progress of projects being built by the carpenters, and offers assistance when asked to do so by the carpenters. Schwilk does not train carpenters, and is not accountable for the carpenters’ performance. Accordingly to Schwilk, individual carpenters are held accountable for their own performance. Schwilk reports

⁹ Schwilk’s position was also referred to as “senior carpenter”.

back to Chalumecky regarding the construction process and will note any problems in that process including “sloppy work.” According to Chalumecky, Schwilk plays no role in Chalumecky’s evaluation of employees, and has no authority to recommend discipline. Schwilk is also responsible for reporting back to the various project managers if the carpenters need special hardware for a project. When not performing these duties, Schwilk, like the other carpenters, builds component parts for the exhibits. Schwilk performs this work at his designated bench in the shop which is located in the area where the rest of the carpenters have their benches and perform their work. Schwilk, like the other carpenters, also assists with the set up of exhibits. Schwilk testified that when set up work is slow, he and the other carpenters perform repair work around the facility, which recently included building furniture for the office. Schwilk testified that he spends approximately 75% of his time performing regular carpentry work of building components and the remaining 25% on other duties as described above.

Schwilk has no authority to discipline, evaluate, hire, fire, suspend, or recommend such action. Chalumecky has assigned Schwilk to show potential job candidates the facility and discuss the work entailed, however, Schwilk has no authority to recommend candidates for hire and in fact has never taken such action. According to Chalumecky, he will ask Schwilk Schwilk's opinion of whether a job candidate has the proper skills; however Chalumecky claims that his discussion with Schwilk in these matters is merely gratuitous and that Schwilk’s opinion does not play a part in Chalumecky’s evaluation of an applicant. Schwilk has no authority to schedule employees, assign overtime, or approve time off such as vacation or sick leave. Chalumecky retains sole authority for these actions.

Applying the above-stated principles to the instant case, I find that the Petitioner has failed to meet its burden of proving that carpenter foreman David Schwilk is a supervisor within the meaning of the Act. Thus, no evidence was presented showing that Schwilk has the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline employees or effectively recommend such action. In regard to record evidence showing that Director of Operations Thomas Chalumecky has on occasion assigned Schwilk to meet with potential job candidates to speak with them about working at the Employer’s facility, show them around the facility and get a feel for their job skills, the record failed to show that Schwilk has the authority to effectively recommend the hire of any of these individuals. Additionally, Schwilk’s role in distributing work assignments to carpenters and or warehouse employees assisting carpenters does not require the use of independent judgment but rather is merely routine in nature inasmuch as record evidence demonstrates that Chalumecky is the individual responsible for actually determining such assignments. Based upon the foregoing, I find that David Schwilk as carpenter foreman/senior carpenter neither exercises nor possesses any indicia requisite to find supervisory status and is therefore properly included in the petitioned-for unit.

C. Freelance/Independent Contractor Carpenters:

As noted above, the Employer herein maintains that individuals hired as freelance carpenters are in fact independent contractors and therefore must be excluded from the Act. The Employer further argues therefore that Dennis Martin who had been hired by the Employer as a freelance carpenter, and was subsequently discharged, should be found ineligible to vote.

Section 2(3) of the Act excludes from the definition of “employee” “any individual having the status of an independent contractor.” The major principle regularly enunciated by the Board and the courts used to determine whether certain individuals are independent contractors and not considered “employees” under the Act is the common law of agency right-to-control test. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); *Ace Doran Hauling Co. v. NLRB*, 462 F. 2d 190 (6th Cir. 1972); *Gary Enterprises*, 300 NLRB 1111 (1990); *Portage Transfer Co.*, 204 NLRB 787 (1973); *Associated General Contractors*, 201 NLRB 311 (1973). Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. See e.g. *Lake Pilots Assn.*, 320 NLRB 168 (1995). In contrast, when control is reserved only as to the result sought, an independent contractor relationship exists. *Gold Medal Baking Co.*, 199 NLRB 895 (1972).

According to Chalumecky, he hires free lance or “independent contractor” carpenters if there is a lot of extra work scheduled in the foreseeable future. This allows Chalumecky the opportunity to “see how they work out, before I (Chalumecky) even decide to hire them.” In seeking freelance carpenters for employment, Chalumecky typically puts an ad in the paper. Chalumecky does not state in the ad that the open position is “freelance” because, as Chalumecky testified, “I don’t think I’d probably get too many people responding if I did” because “maybe if they’d seen it was just temporary work right away, maybe they wouldn’t even call.”

During the interview of freelancers, Chalumecky at times has discussed the fact that the individual was only being hired for an immediate project as an independent contractor. At other times, employment was open ended and at has resulted in the employee being hired permanently. Chalumecky estimated that about 25 to 50% of the individuals he initially hires as independent contractors or freelancers are offered permanent employment and recalled hiring at least two permanent carpenters in this manner. At the time that these individuals were converted to permanent employees, Chalumecky recalled that one individual received fifty cents more per hour than he had been paid as a freelancer and the other individual was paid the same rate. Freelancers are not offered either written or verbal contracts of employment. Chalumecky testified that the determinant as to whether a freelance carpenter will stay on is to a large extent driven by the amount of work the Employer has.

Freelancers are hourly paid rather than paid a flat rate for a particular project. Freelancers are not guaranteed to be paid any particular sum. Freelancers submit a time card, time sheet and invoice directly to Chalumecky who reconciles the documents and then submits a request for payment directly to accounting. Accounting then cuts a weekly check to freelancers for the full amount without taking out payroll deductions. Freelancers are not on the employer’s payroll. Chalumecky testified that freelancers are not required to provide their own invoice for payment and that if they don’t have one, the Employer provides such document. Chalumecky testified that he “negotiated” the hourly wage with potential freelance candidates. Chalumecky cited his recent hire of Dennis Martin as an independent contractor. According to Chalumecky, in “negotiating” his hourly wage, Martin asked to know the wage range of the Employer’s other

carpenters, and then stated that he would like to be paid between \$20 and \$22 per hour. Chalumecky agreed to pay him \$21 per hour. Martin was apparently discharged after working for the Employer approximately one week. Martin's discharge is the subject of an unfair labor practice charge currently under investigation.

Freelancers are issued a 1099 tax form and no payroll taxes are deducted from their wages. Freelancers work the same designated hours and receive the same designated breaks as the Employer's permanent carpenter employees. Freelancers have access to all of the Employer's facility as do all of the other permanent employees employed by the Employer. Freelancers do not receive company paid fringe benefits.

The Employer supplies all materials and heavy equipment for freelancers to use. Chalumecky testified that freelancers may if they choose bring in their own personal hand tools, however if they choose not to, hand tools are provided for them by the Employer. The Employer's regular carpenters also have the option of bringing and using their own hand tools if they prefer. Otherwise the Employer provides hand tools to its regular carpenters.

Freelancers do not have the authority to subcontract the work they are assigned to do for and by the Employer. The Employer does not charge freelancers for deficiencies in their work. Chalumecky testified that the Employer has never held back money owed to a freelance as a retainer. Freelancers have never brought in additional freelancers to work with them or referred other freelancers to work for the Employer.

Chalumecky testified that freelancers perform the duties of the Employer's regular carpenters and are assigned simple basic carpentry work. Chalumecky testified that he supervises the freelancers, and that Schwilk and the other carpenters help to oversee their work. In this regard, Chalumecky recalled that Dennis Martin, who the Employer hired as an independent contractor/freelancer during the summer was assigned to work with another permanent carpenter and serve as that carpenter's helper. Chalumecky testified that the permanent carpenter had exclusive authority to direct Martin's work, and had the ability to say, "Dennis I need you to help me with X, Y or Z." Chalumecky testified that the work of the freelance carpenters is part of the normal business of the Employer. At the time of the instant hearing, the Employer employed no freelance carpenters.

In the instant case, record evidence makes clear that the Employer reserved both the right to control the ends to be achieved as well as the means to be used in achieving those ends. Thus, Chalumecky testified that individuals hired as freelance carpenters perform functions that are an essential part of the Employer's normal operation; do not have a permanent working arrangement with the Employer contingent upon their continued satisfactory performance; do not operate pursuant to either a verbal or written agreement; are paid hourly rather than a flat rate per project and are not guaranteed to be paid any particular sum; do not have the authority to subcontract the work they do; and are not charged for deficiencies in their work. Further, the Employer supplies all materials and

equipment used by freelance carpenters.¹⁰ Chalumecky testified that freelancers perform the duties of the Employer's regular carpenters and are assigned only simple basic carpentry work. Significantly freelancers are supervised by other carpenters who have exclusive authority to direct their work. In regard to Dennis Martin, Chalumecky testified that he hired Martin to serve as a carpenter's helper for a permanent carpenter and that the permanent carpenter had exclusive authority to direct Martins' work. The Board has recognized these factors as significant in determining the extent to which an employer retains the right-to-control and whether an employment relationship exists. *Standard Oil Co.*, 230 NLRB 967, 968 (1977). That the Employer herein issues individuals hired as freelance carpenters a 1099 tax form and does not make payroll deductions from their wages is not determinative in assessing whether the employer retains their right to control. *Miller Road Dairy*, 135 NLRB 217, 220 (1962).

Based upon the foregoing, I find that individuals hired by the Employer nominally as "freelance carpenters" and/or "independent contractors" are in fact employees within the meaning of the Act, albeit in some circumstances, merely temporary employees. Inasmuch as both parties stipulated that temporary carpenters and warehouse assistants are properly included in any unit found appropriate, employees so hired, who are on the Employer's payroll as of the cutoff date for eligibility are eligible to vote. Accordingly, I find that Dennis Martin is eligible to vote subject to challenge pending the determination of the unfair labor practice charge filed regarding his discharge by the Employer.

V. Summary

Based upon the foregoing and the entire record herein, I find that the following unit is an appropriate unit and order an election therein: "all full-time, regular part-time, and temporary carpenters and warehouse assistants employed by the Employer at its facility currently located at 310 South Church Street, Addison, Illinois but excluding sales employees, design employees, estimating employees, graphics employees, project managers, field service supervisor employees, office clericals, professional employees, guards and supervisors as defined by the Act." There are approximately nine employees in this unit. I further find that David Schwilk is not a supervisor within the meaning of the Act, and is therefore eligible to vote; individuals hired by the Employer as freelance carpenters and/or independent contractors are employees within the meaning of the Act and are therefore properly included in the unit as temporary employees; and Dennis Martin who had been hired by the Employer as a freelance carpenter/independent contractor is eligible to vote subject to challenge.

V. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be

¹⁰ Chalumecky specifically testified that if individuals hired as freelance carpenters do not have or wish to supply their own invoice forms and/or hand tools such items will and have been provided by the Employer.

issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

VI. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9th Floor, Chicago, Illinois 60604, on or before October 20, 2005. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **October 27, 2005**.

DATED at Chicago, Illinois this 13th day of October, 2005.

Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604

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